

# Must Counsel Anticipate Judicial Error?

It comes as no great surprise that trial judges sometimes render decisions that are incorrect as a matter of law. If that were not the case, we would have less of a need for appellate courts. But in the arena of asserting meritorious legal-malpractice claims, is counsel saddled with the duty to anticipate that the trial judge will rule contrary to the applicable statutory and case law? The Supreme Court of Texas recently addressed this thorny issue.

In *Stanfield v. Neubaum*, 494 S.W. 3d 90 (Tx. 2016), a legal-malpractice action, the defendant lawyers had allegedly failed to raise two meritorious legal defenses but, as later vindicated by the appellate court, had correctly raised a third issue that would have been and should have been dispositive of the case in their clients' favor. Unfortunately the trial court ruled incorrectly with respect to that third defense and it required a ruling by an appellate court to correct the trial court's legal error. Although the clients ultimately prevailed on their counterclaim for \$150,000, the appeal cost them more than \$140,000 in attorney's fees.

As a result, the clients contended that they had a viable legal-malpractice claim because if their counsel had raised the first two meritorious defenses and provided an expert report, the trial court would have had the opportunity to rule in their favor with respect to one or both of those defenses, saving them the expense of an appeal. In short, the clients contended that their counsel should have anticipated that the trial court would commit error and should not have relied upon only one of the meritorious defenses available.

The defendant lawyers denied that they had engaged in any negligent conduct. Instead they contended that the appellate court's reversal of the trial court vindicated their trial strategy. They contended that "the trial court's error was the sole cause of the [clients'] injury because the [attorneys] pursued a winning strategy and did not contribute to the judicial error." The trial court, embracing this argument, granted the defendant lawyers' summary-judgment motion.

The clients appealed to Texas' court of appeals which, in a divided decision, reversed and remanded in part. The court reasoned that expert testimony was required "to prove [that] the attorneys' failure to produce expert testimony was fatal to their summary-judgment motion." That court declined to address the issue of "whether judicial error can constitute a superseding cause that breaks the causal chain and, as a matter of law, negates proximate cause."

The dissenting judge considered the judicial-error issue and found, based on undisputed facts, that "the summary-judgment evidence conclusively established judicial error

was a new and independent [cause] of the [clients'] alleged harm." In the dissenter's view, "the trial court's error was unforeseeable because the [attorneys'] negligence did not cause or contribute to the judicial error and, in fact, the alleged acts of negligence were wholly unrelated to the trial court's error."

The Supreme Court of Texas granted allowance of appeal to address two issues: "(1) whether judicial error constitut[ed] a superseding cause of the [clients'] injuries in the absence of evidence the attorneys contributed to the error and (2) whether expert testimony [was] necessary to conclusively establish a lack of causation in these circumstances." Thereafter, the Texas Supreme Court reversed the decision of the court of appeals.

The Texas Supreme Court agreed with the argument by the defendant lawyers that, based upon undisputed facts, "judicial error was a new and independent cause of the [clients'] damages, superseding the [attorneys'] alleged negligence and negating proximate cause as a matter of law." The court acknowledged that negligent conduct, i.e., breach of a duty, is the proximate cause of the injury if it is both "a cause in fact of the harm and the injury was foreseeable." Proof of cause in fact, in the court's view, is established where "(1) the negligent act or omission was a substantial factor in bringing about the harm at issue, and (2) absent the negligent act or omission ('but for' the act or omission), the harm would not have occurred." Thus, if the negligent conduct "merely creat[es] the condition that makes the harm possible,' it is not a substantial factor in causing the harm as a matter of law."

The court noted that foreseeability of injury, which is a question of law, is established by showing that "a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission." With respect to determining both cause in fact and foreseeability, the court said such findings cannot involve "conjecture, guess and speculation."

In drawing the line between a concurring cause and an intervening cause, the court posited the question: "If the intervening cause and its probable consequences are a *reasonably* foreseeable result of the defendant's negligence, the intervening cause 'is a concurring cause as opposed to a superseding or new and independent cause.'" (Emphasis in original.) Stated differently, citing Texas case law, the court framed the issue as "Was there an unbroken connection? Would the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?" The Texas Supreme Court noted that determination of foreseeability is "highly fact specific" and "must be determined 'in the light of the attending circumstances,' not in the abstract."

Turning to the question of whether judicial error by the trial

## Avoiding Liability



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court constitutes "a superseding or new and independent cause," the court found that it does. First, the court noted that if the judicial error were committed by a third party and the error "is a reasonably foreseeable *result* of the attorney's negligence in light of *all existing circumstances*," then it is a concurring cause. (Emphasis in original.) But if, as the court noted, the judicial error "destroy[ed] the causal connection between the original negligence and the harm, even if the original negligence is the 'but for' cause of the intervening cause," then it is "a new and independent [cause that] may 'intervene between the original wrong and the final injury such that the injury is attributed to the new cause rather than the first and more remote cause.'"

Moreover, that court noted that while the fact that a court may commit judicial error as a general proposition is foreseeable, it is not foreseeable in what manner the court may err. Accordingly, the Texas high court held that "If an attorney does not contribute to the judicial error itself and the judicial error is not otherwise reasonably foreseeable in the particular circumstances of the case, the error is a new and independent cause of the plaintiff's injury if it 'alters the natural sequence of events' and 'produces results that would not otherwise have occurred.'"

In this case, the Supreme Court of Texas found that the judicial error was not reasonably foreseeable and, therefore, was an intervening, superseding cause of the harm, which absolved the defendant lawyers of any liability, notwithstanding their negligent conduct, which did not contribute to the error.

The lesson learned from this case is that a lawyer's failure to raise a winning argument can be excused by the trial court's failure to recognize another winning argument that the lawyer did raise — failure that is specifically excused as a superseding, intervening cause of the harm.